

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LEE OLSON,

Plaintiff,

VS.

ALAN BELL, et al.,

Defendants.

2:13-cv-571-JCM-NJK

ORDER

This matter is before the Court on Plaintiff's Motion to Expedite Limited Discovery and Order Scheduling Preliminary Injunction Hearing (#4).

BACKGROUND

The Plaintiff is a common stock holder of Assisted Living Concepts, Inc. (ALC). *Complaint*, Docket No. 1. On February 26, 2013, ALC and TPG Capital, L.P., jointly announced they had reached a definitive Agreement and Plan of Merger. *Id.* The Merger Agreement requires approval of a majority of ALC's shareholders. *Id.* On March 11, 2013, ALC filed a Proxy Statement on Schedule 14A with the SEC. *Id.*

The Plaintiff alleges that the Proxy Statement omits and/or misrepresents material information concerning, among other things: (i) the sales process and the process by which the Board entered into the Proposed Buyout; (ii) the key data and inputs underlying the financial valuation exercises that purport to support the fairness opinion (“Fairness Opinion”) provided to the Company’s Board by Citigroup Global Markets, Inc. (“Citi”), the special committee’s (“Special Committee”) financial advisor; and (iii) certain financial projections prepared by ALCI’s management and relied upon by Citi in issuing its Fairness Opinion regarding the Proposed Buyout.

1 Accordingly, the Plaintiff filed a Complaint on April 3, 2013, asserting violations of sections
2 14(A) and 20(A) of the Securities and Exchange Act of 1934. *Id.* The Complaint indicates that as
3 a result of the materially deficient Proxy Statement, ALC's public shareholders will be unable to cast
4 an informed vote regarding the Proposed Buyout. *Id.*

5 The Clerk of the Court has issued summons as to the Defendants. To date, no certificate of
6 service has been filed nor have any Defendants answered or otherwise appeared.

7 The same day the Complaint was filed, the Plaintiff filed the present Motion to Expedite
8 Limited Discovery and Order Scheduling Preliminary Injunction Hearing (#4), along with a
9 Memorandum (#5) and Declaration (#6) in support of the Motion.

10 The Plaintiff's Motion seeks a Court Order requiring the Defendants to provide the following
11 discovery within five days of the requested order:

- 12 1. Minutes of meetings of the Board of ALCI, or any committee thereof, at which any
13 of the following was discussed: the Proposed Buyout or any strategic alternative for
ALCI, or valuations of ALCI;
- 14 2. Financial projections and forecasts prepared by ALCI's management and provided
15 to Citi in connection with its Fairness Opinion regarding the Proposed Buyout;
- 16 3. Books and presentations (including drafts) prepared by Citi concerning the Proposed
Buyout, as well as all materials supporting such books and presentations;
- 17 4. Communications, including emails for deponents based on limited search terms
18 related to the Proposed Buyout;
- 19 5. Communications between ALCI and the SEC regarding the Proposed Buyout and/or
the Proxy Statement;
- 20 6. Deposition of the CFO or the person most knowledgeable about the projections and
21 a director at ALCI; and
- 22 7. Deposition of the person most knowledgeable from Citi concerning the Proposed
Buyout.

23 The Plaintiff asserts that he needs this discovery on an expedited basis because a shareholder
24 vote on the proposed buyout is imminent. The Plaintiff plans to move for a preliminary injunction
25 and the above listed discovery will give him the information he needs to do so.

26 The Plaintiff has also requested that the Court schedule a hearing on a motion for preliminary
27 injunction which the Plaintiff states he intends to file.

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DISCUSSION

Generally, discovery does not commence until after the Rule 26(f) conference. Fed.R.Civ.P. 26(f). However, upon a showing of good cause, Courts may permit expedited discovery before the Rule 26(f) conference. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009); citing *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F.Supp.2d 1160, 1179 (C.D.Cal.2008); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.Cal.2002); see also *Qwest Commc'ns Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003) 419 (The “party seeking expedited discovery in advance of [the] Rule 26(f) conference has the burden of showing good cause for the requested departure from usual discovery procedures.”); *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 623 (N.D.Ill.2000) (“Expedited discovery is not the norm. Plaintiff must make some *prima facie* showing of the *need* for the expedited discovery.”). “Good cause exists ‘where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.’ ” *Id.*

“The good cause standard may be satisfied where a party seeks a preliminary injunction.” *Qwest Commc'ns Int'l, Inc.*, 213 F.R.D. at 419. However, expedited discovery is not automatically granted merely because a party seeks a preliminary injunction. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009); citing *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 7 (D.D.C.2006). Rather, “where a plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it makes sense to examine the discovery request ... on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances....” *Merrill Lynch, Pierce, Fenner & Smith*, 194 F.R.D. at 624. The requirement that a plaintiff obtain leave of court for expedited discovery serves to maintain the fairness of civil litigation. *Id.*

The Court considers the following factors when determining whether to permit expedited discovery: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made. *Am. LegalNet, Inc.*, 673 F. Supp. 2d at 1067.

1 A. Whether a Preliminary Injunction is Pending

2 Here, there is no preliminary injunction pending. However, the Plaintiff has requested
 3 expedited discovery for the purpose of preparing for a preliminary injunction hearing. When “a
 4 plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it makes sense
 5 to examine the discovery request [...] on the entirety of the record to date and the reasonableness
 6 of the request in light of all of the surrounding circumstances.” *Merrill Lynch, Pierce, Fenner &*
 7 *Smith*, 194 F.R.D. at 624.

8 The record in this case is currently quite limited. The Docket consists of the Complaint,
 9 the Summons, and the present Motion. There is no indication that any Defendant has been served
 10 or is otherwise aware of this case. Indeed, the Docket shows that there are currently no attorneys
 11 to be noticed on behalf of the Defendants. Further, two of the Plaintiff’s seven expedited
 12 discovery requests are seeking the depositions of three people. Aware of these circumstances, the
 13 Plaintiff has nevertheless requested that the Defendants make the requested discovery
 14 productions within five days of his requested Court Order. Considering that there is no indication
 15 that the Defendants are even aware of this case yet, and that the Plaintiff’s requests are
 16 substantial, including three depositions, the request for “limited” discovery production within
 17 five days of this order is unreasonable.¹

18 B. Breadth of the Discovery Requested

19 Although the Plaintiff asserts that he is seeking a “limited” amount of discovery, the
 20 discovery sought is quite substantial.

21 The Plaintiff is seeking the minutes of meetings of the Board of ALC, or any committee
 22 thereof, at which any of the following was discussed: the Proposed Buyout or any strategic
 23 alternative for ALC, or valuations of ALC; financial projections and forecasts prepared by ALC’s

24
 25 ¹However, a different expedited discovery schedule might be more appropriate considering
 26 the circumstances of this case. The Plaintiff has represented that a shareholder vote is imminent and
 27 that he intends to move for a preliminary injunction preventing the vote as soon as he has the
 28 necessary discovery. Under these circumstances, waiting for the Defendants to answer and then an
 additional 30 days until the Rule 26(f) conference, could preclude the Plaintiff from moving for a
 preliminary injunction. Thus, expedited discovery, commencing after the appropriate Defendants
 have been served, may be appropriate. The Plaintiff is permitted to re-file his request for expedited
 discovery with a more reasonable time-frame.

1 management and provided to Citi in connection with its Fairness Opinion regarding the Proposed
2 Buyout; books and presentations (including drafts) prepared by Citi concerning the Proposed
3 Buyout, as well as all materials supporting such books and presentations; communications,
4 including emails for deponents based on limited search terms related to the Proposed Buyout;
5 communications between ALC and the SEC regarding the Proposed Buyout and/or the Proxy
6 Statement; the deposition of the CFO or the person most knowledgeable about the projections
7 and a director at ALC; and the deposition of the person most knowledgeable from Citi
8 concerning the Proposed Buyout.

9 Essentially, the Plaintiff is seeking all documentation related to his claim as well as three
10 depositions of persons who would be quite knowledgeable about his claim and he wants
11 everything produced within five days' time. The Plaintiff asserts that he needs this discovery in
12 order to move for a preliminary injunction, but he has failed explain why he needs such
13 expansive discovery. The Plaintiff has either made little effort to tailor the requested expedited
14 discovery to only the information he needs to file a preliminary injunction or he has failed to
15 explain to the Court why he cannot move for a preliminary injunction with substantially less
16 discovery than he has requested in the instant motion.

17 Finally, the Plaintiff states that he is "willing to work with the Defendants to narrow the
18 scope even further to lessen any potential burden on Defendants." This indicates that the Plaintiff
19 is aware that his requests can, and potentially should, be narrowed. Thus, if the Plaintiff wishes
20 for the Court to allow expedited discovery, he should first narrow and tailor his discovery
21 requests accordingly. The Court finds that the Plaintiff has not shown good cause for why, at this
22 stage of the litigation, he needs all the discovery he has requested.

23 C. Purpose for Requesting Expedited Discovery

24 The Plaintiff's purpose for requesting expedited discovery is very reasonable.
25 Considering that a shareholder vote is imminent and that the Plaintiff claims the voters are being
26 misled, his motion for preliminary injunction is likely imperative to his case. Accordingly, the
27 Court finds that the general purpose for requesting expedited discovery is supported by good
28 cause.

1 D. Burden on Defendants to Comply with the Requests

2 The current request for expedited discovery creates a substantial burden on the
 3 Defendants for two reasons, particularly considering there is no indication that the Defendants
 4 even know of the existence of the instant case . First, the proposed time-line for production, as
 5 discussed above, is unreasonable. Second, the Plaintiff seeks a significant amount of discovery,
 6 including three depositions.

7 E. How far in Advance of the Typical Discovery Process the Request was Made

8 The Complaint was filed on April 3, 2013. The Plaintiff has 120 days to serve the
 9 Defendants, making August 1, 2013, the last possible day for service of process. *See*
 10 Fed.R.Civ.P. 4(m). Once served, the Defendants have 21 days to respond, the Rule 26(f) meeting
 11 should occur 30 days after the first Defendant answers or otherwise appears, and then the parties
 12 have another 14 days to file a stipulated discovery plan and scheduling order. *See* Fed.R.Civ.P.
 13 12(a)(1) and LR 26-1. Therefore, the Plaintiff's request for expedited discovery, made on April 3,
 14 2013, the same day he filed the Complaint, was made as far in advance of the typical discovery
 15 process as possible. Considering the imminent shareholder vote, however, such an advanced
 16 request may be understandable, but is simply not practical for the reasons discussed above,
 17 specifically the lack of proof of service on the Defendants.

18 Accordingly, the Court denies the Plaintiff's request for expedited discovery, but instructs
 19 the Plaintiff that he may re-file a request for expedited discovery that contains a more achievable
 20 time-line and more tailored discovery requests.

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CONCLUSION

Based on the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's Motion to Expedite Limited Discovery and Order Scheduling Preliminary Injunction Hearing (#4) is **DENIED without prejudice.**

IT IS FURTHER ORDERED

DATED this 10th day of April, 2013.



NANCY J. KOPPE
United States Magistrate Judge